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In The

Supreme Court of the United States

October Term, 1995

CARGILL, INCORPORATED,
a Delaware Corporation,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, THE ALLIANCE FOR AMERICA, AND THE FAIRNESS TO LANDOWNERS COMMITTEE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the extension of the United States Army Corps of Engineers' regulatory jurisdiction under the Clean Water Act to reach non-navigable isolated waters solely on the ground of their use by migratory birds oversteps the bounds of the Commerce Clause?

2. Whether the "migratory bird rule," as applied by the Corps and EPA over shallow, non-navigable seasonal "ponds" wholly unconnected to any other body of water, is invalid as inconsistent with any reasonable construction of the Clean Water Act, 33 U.S.C. § 1251, *et seq.*?

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Mountain States Legal Foundation ("MSLF"), the Alliance for America, and the Fairness to Landowners Coalition respectfully submits this brief *amici curiae* in support of Cargill Incorporated, the Petitioner for *writ* of *certiorari*.[1]

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

The Alliance for America ("Alliance") is a fifty-state network of nearly five hundred independent grassroots organizations, whose collective membership numbers in the millions. These groups represent a variety of vocational, cultural, and political interests including farming, grazing, forestry, commercial fishing, mining, recreation, energy, animal welfare, private property protection, local government and various community and regional organizations. The Alliance was formed in 1991, and is intent on curbing excessive governmental regulation and the violation of constitutionally protected property rights resulting in family and community despair.

The Fairness to Land Owners Committee ("FLOC") is a Maryland-based, national organization with over 18,000 members who are property owners faced with confiscatory land-use regulations involving a number of federal and state statutes. FLOC is dedicated to protecting property rights, especially the right to the prudent use of one's own land, and is active in educating the public and lawmakers about the difference between conservation and confiscation.

MSLF is a non-profit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural

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[1] *Amici* have obtained the written consents of the parties. The written consents have been provided to the Clerk of the Court.

resources and, as a result, are actively involved in many environmental issues.

Many of *amici*'s members are engaged in farming and ranching activities across the country. Farming and ranching have long been recognized as the backbone of this nation:

> Whenever there are in any country uncultivated lands and unemployed poor it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for men to labor and live on. . . . The small landowners are the most precious part of the state.

Thomas Jefferson, *Writings*, Vol. XIX, p. 17.

As demonstrated herein, the implications of the Petitioner's case far transcends the Petitioner's individual situation and is indicative of problems of nationwide magnitude. This case presents serious questions of how individual rights are to be protected from governmental excesses, both in the enforcement of laws, for the ostensible protection of the environment, and the administration of justice. *Amici* believe it is vitally important for this Court to protect these individual freedoms in the face of increasing civil and criminal enforcement under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq*.

Amici's interests in the outcome of this lawsuit are directly tied to their members' private property rights. *Amici* have serious concerns that the ruling of the Ninth Circuit does violence to precedents written by this Court that recognize the constitutional limitations of our federal government.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE

Amici hereby adopt Petitioner's statement of the case and description of the opinions below, jurisdiction, and statutes involved.

SUMMARY OF THE ARGUMENT

This case presents this Court with an extremely important constitutional issue on the reach of federal jurisdiction under

the Commerce Clause that has grave consequences for thousands of private property owners whose farms, back yards, or one-quarter acre lots are subjected to strict and overly burdensome federal land-use control under the CWA. However, the CWA is not a federal land-use statute, its purpose is to protect water quality. The Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") have assumed jurisdiction under the CWA that, given their penchant for overregulation, has caused them to regulate private property without any nexus to interstate commerce.

REASONS FOR GRANTING THE *WRIT*

I. INTRODUCTION: SECTION 404: THE GOVERNMENT'S PENCHANT FOR OVERREGULATION.

The CWA, known as the Federal Water Pollution Control Act at the time of its enactment in 1972, is a comprehensive effort by Congress to restore and maintain the "chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). However, as laudatory as these goals may be, the actual legal requirements are found in other sections of the statute.

The cornerstone of the regulatory scheme established by the CWA is Section 301, 33 U.S.C. § 1311, which prohibits the discharge of "any pollutant" into "navigable waters," except when in compliance with various sections of the CWA, including Section 404, 33 U.S.C. § 1344. Section 404 establishes a program whereby the Corps issues permits for the "discharge of dredged and fill material." The Section 404 program is somewhat of an orphaned hybrid that arose out of the combination of the historic regulation by the Corps of obstructions to navigation under the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, and the environmental concerns of the CWA.

A troublesome shortcoming of the Section 404 program is that it bears, at best, a strained relationship to the purposes of the CWA, as evidenced the civil enforcement action brought against Petitioner. The purpose of the CWA is to protect water quality, not to regulate land-use. As stated recently by Judge Vinson in a similar CWA enforcement action:

> This case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corps of Engineers under the Clean Water Act. In a reversal of terms that is worthy of *Alice In Wonderland*, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry *land* may be imprisoned for the statutory felony offense of "discharging pollutants into the navigable *waters* of the U.S."

United States v. Ocie Mills, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993) (emphasis in original).

The substance of the CWA's jurisdictional boundaries has not been altered by Congress since 1977. Even when Congress considered the 1977 amendments to Section 404, it attempted to curb what many members of Congress perceived as "the Corps' penchant for overregulation, particularly in cases of *de minimus* environmental concern." *1902 Atlantic, Ltd. v. Hudson*, 574 F. Supp. 1381, 1397-98 (E.D. Va. 1983). The *1902 Atlantic, Ltd.* Court's quotation from a colloquy during the floor debate on the Senate bill, (S. 1952) between Senator Muskie (the Senate manager of the 1977 amendments) and Senator Bentsen, is illustrative of Congress' concern for the Corps' penchant for overregulation:

> MR. BENTSEN: Mr. President . . . Section 404 has become a symbol to many Americans of how a well-intended legislative initiative can turn into a quagmire of disruption, frustration, and bureaucratic entanglement for the ranchers, farmers, foresters, and average citizens of this country.
>
> * * *
>
> Section 404 has become synonymous with Federal overregulation, overcontrol, cumbersome bureaucratic procedures, and a general lack of realism. . . .
>
> * * *
>
> During Senate consideration on the conference report on the Clean Water Act of 1977, Senator Muskie,

> who also was one of the Senate conferees, stated that the statements made during Senate debate, such as the statements above, adequately reflect the legislative intent with respect to Section 404.

1902 Atlantic, Ltd., 574 F. Supp. at 1398, n.16 (quoting Legislative History of the Clean Water Act of 1977, Vol. 3-4, pp. 470, 901-902 (1978)) (emphasis added).

Unfortunately, despite the concerns expressed in 1977, by Senators Bentsen and Muskie, things have become worse – not better. The "penchant for overregulation" (by both the Corps and EPA) now victimizes farmers and landowners nationwide, including *amici*'s membership, as the Corps and EPA attempt to use the CWA to expand their "regulatory turf" out of the water, out of the swamps and marshes, straight onto dry land.

Much like Judge Vinson's discomfort with the Corps' regulatory framework, in *United States v. Larkins*, 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1131 (1989), Circuit Judge Merritt went out of his way, *sua sponte*, to criticize the Corps' overexpansive jurisdictional approach:

> [T]he Corps has not expanded the definition of "navigable waters" to include any creek or stream or moist area. . . . "Under such a construction [as proposed by the Corps of Engineers] low lying backyards miles away from a navigable waterway would become wetlands." [citation omitted] The Corps' definition has apparently detached and untied the "wetlands" jurisdiction of the Corps from any concept of "open waters" or navigable waters. A farmer's low lying farmland or a homeowner's low lying backyard – adjacent to a small stream or creek many miles from any navigable waterway – has apparently been converted into government property no longer subject to control or improvement by the owner without government permission. A "wetlands" has apparently been read to include simply "moist land adjacent to a creek." The framers of the Constitution were solicitous of the rights of landowners – especially small farmers struggling for survival – not to have land appropriated by the government. They

> therefore adopted the provision of the Fifth Amendment of the Constitution prohibiting the taking of private property for public use without just compensation.

United States v. Larkins, 852 F.2d at 193 (Merritt, J., concurring).

Unlike the present case, *Larkins* involved land covered in part with "knee deep waters" and cypress trees, 659 F. Supp. 76, 79, containing numerous sloughs and depressions which defendants filled, 852 F.2d at 190, and which previously "tended to be covered by standing water." *Id.* at 191. Although this Court has held that a "taking" claim is no defense to a § 404 enforcement action, *see United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985), as indicated by Judge Merritt in *Larkins*, it is fundamentally wrong for the government to try to seize control of its citizens' property under the pretext of enforcing an "anti-water pollution" statute. *See* Exec. Order 12630, March 15, 1988, 53 *Fed. Reg.* 8859, "Governmental Actions and Interference With Constitutionally Protected Property Rights" (directing each agency to account for Fifth Amendment "taking" concerns in carrying out actions, including regulatory and permitting functions).

A. THE REGULATORY HYDRA: REGULATING DRY LAND WHEN THE CORPS' REGULATIONS PURPORT TO REGULATE ONLY TRULY AQUATIC AREAS.

The federal government's new trend (*i.e.*, regulating under § 404 as if it were a "land preservation statute," instead of an "anti-water pollution" statute), even conflicts with the Corps and EPA's own regulations. The regulations defining "wetlands" have remained unchanged since 1977. After defining "wetlands," the regulations further clarify the definition by stating that "[w]etlands generally include swamps, bogs, marshes, and similar areas." 33 C.F.R. § 328.3(b). As stated in the preamble to the 1977 regulations, this language was included to demonstrate the intent of the Corps to include "only truly aquatic areas." 42 *Fed. Reg.* 37,129 (1977).

Notably, the Corps' clarifying sentence of its "wetlands definition" does *not* state that wetlands generally include *corn fields*, *soybean fields*, and *vacant lots*. Thus, unless corn fields, soybean fields, and vacant lots are "similar areas" to "swamps, marshes, and bogs," 33 C.F.R § 328.3(b), regulatory jurisdiction cannot attach.

The rule of *ejusdem generis* demands that "where general words follow an enumeration of specific things, the general words are read as applying only to other items akin to those specifically enumerated." *Harrison v. P.P.G.*, 446 U.S. 578, 588 (1980).

The general words "similar areas" follow the more specific words "swamps, marshes, bogs" in the definition of wetlands contained in 33 C.F.R. § 328.3. Consequently, for land to be considered a "wetland," it must be the same type of area as a swamp, marsh, or bog. The Corps and EPA, however, have recently attempted to discard this plain reading, and now interpret the phrase "similar areas" to mean "other areas" – including cultivated farm fields, dry lots, and other typically non-aquatic areas.

Why the new quest to regulate dry land? An environmental group's recent publication sheds light on the Corps' motive – bureaucratic self-preservation:

> For civil engineers in general, environmental projects offer a boundless future. For the Corps in particular they mean job security. The day of huge river basin projects has passed; with growing public resistance to such projects, and tightening budget constraints, the Corps could be relegated to custodian status. Environmental engineering offers the Corps steady work, an image pure and true – and an almost bottomless pork barrel.

Audubon Magazine, July, 1990, at 111. Thus, from the Corps' own self-interest arose a new Manual for making jurisdictional determinations over supposed "wetlands."

B. THE PENCHANT FOR OVERREGULATION SIGNIFICANTLY IMPACTS THOUSANDS OF SMALL, PRIVATE LANDOWNERS.

The national significance of this case, and the nationwide magnitude of the problem faced by landowners, is heightened by the Corps/EPA attempt to leave behind their aquatic jurisdictional boundaries and come onto dry land. A revealing and alarming portrait of these agencies' view of their expanding jurisdiction is found in an EPA publication that states: "If there's not a wetland in your neighborhood, there's probably one nearby." EPA: "America's Wetlands: Our Vital Link Between Land and Water," p. 1 (1988). Landowners across the nation have become outraged and adamantly disagree with the agencies' claims that their normally dry, solid-ground constitutes "navigable water" under the CWA, and that merely moving dirt (not "cellar dirt," 33 U.S.C. § 1362(6)) in a field, or on a dry lot, is considered a "discharge of a pollutant into water." Thus, Petitioner's question presents an important issue for this Court to decide, that is, whether, as a matter of statutory interpretation, § 1362(6) of the CWA, which defines "pollutants" as certain materials "discharged into water," can be construed to mean the discharge of clean fill in a temporarily ponded area that might be visited by migratory birds.

Significantly, many, if not most landowners (such as Petitioner) find themselves confronted with the agencies' jurisdictional claim only *after* they have already commenced work on what any reasonable person would view as a non-aquatic area. When the agencies assert jurisdiction and inform the landowner that he or she is a "violator" and a "water polluter" subject to the wide gambit of potential penalties and injunctive relief set forth in the CWA, *see* 33 U.S.C. § 1319, the landowner is placed in a precarious position. He can capitulate, face an "enforcement action," or attempt to obtain judicial declaratory relief for an action that no reasonable person would have considered to be illegal.[2] The agencies then typically

[2] However, the Courts of Appeals are consistently holding that the Corps and EPA's administrative "cease and desist" orders are "pre-enforcement review" and

capitalize on their superior bargaining position and the extreme imbalance of economic and other resources to extort "mitigation" by offering the "carrot" of a § 404 permit, all the while "wielding the club" of enforcement, which includes the threat of imprisonment, fines, costly litigation and/or "restoration" – alternatives and risks the agencies know the unfortunate landowner can ill afford.

II. BACKGROUND ON THE STRUCTURE OF THE CONSTITUTION.

Amici applaud this Court's renewed discussion of "first principles." *United States v. Lopez*, 115 S.Ct. 1624 (1995). For nearly two hundred years, this Court has held that "It is, emphatically, the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137 (1803). Indeed, "[t]his is the very essence of judicial duty." *Id.* at 178. Therefore, though not written into the Constitution, the power of judicial review is a bed-rock principle of American jurisprudence. In exercising this power, *Amici* respectfully suggests that the Court must be mindful that "[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written." *Marbury* at 176.

A. SCOPE OF THE COMMERCE POWER.

The scope of Congress' power under the Commerce Clause is set forth in *Hodel v. Virginia Surface Mining & Reclamation Assoc.*: "This power is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." 452 U.S. 264,

therefore, not reviewable by the Courts. *See, Laguna Gatuna, Inc. v. Browner, et al*, ___F.3d ___ (10th Cir. 1995), Petition for Certiorari filed September ___, 1995); *Southern Ohio Coal Co. v. Office of Surface Mining*, 20 F.3d 1418 (6th Cir.), *cert. denied* ___ U.S. ___ 115 S.Ct. 316, 130; *Rueth v. United States EPA*, 13 F.3d 227 (7th Cir. 1993); *Southern Pines Association v. United States*, 912 F.2d 713 (4th Cir. 1990).

276-277 (1981). Perhaps the quick conclusion is that the foregoing defines an unlimited power, one that is unlimited both in its jurisdictional reach and in Congress' authority to set the limits of that reach. However, the constant refrain in most, if not all, of this Court's cases reviewing each new exercise of the Commerce power is that there are not only limits, but constitutionally required limits dictated by the federalist structure embodied in the Constitution. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

In light of this federalist structure, the Commerce power is not and cannot be unlimited because it is only one of several defined and enumerated powers. *U.S. v. Lopez*, 115 S.Ct. at 1628. When an exercise of that power threatens to "obliterate the distinction between what is national and what is local," it is the duty of this Court to articulate and apply constitutional limits upon that power.[3] Thus, while Congress' power is plenary, Congress does not possess the authority to reach beyond the boundaries the Constitution establishes. The power is plenary only within its own sphere. Further, the existence and vitality of this principle is not disputed, is consistently reiterated by this Court, and is implicit in the delegation of powers contained in Art. I, Sec. 8.

Indeed, if the framers intended to give Congress the power to operate in all spheres, it would not have been necessary to list the spheres of Congressional power in the Constitutional text. Moreover, to remove any doubts as to the intentions of the framers in this regard, the principle was included within the

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[3] [I]t would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be in commerce. Nor is it sufficient that the person or activity reached have some nexus with interstate commerce. Our cases have consistently held that the regulated activity must have a substantial effect on interstate commerce. Moreover, simply because Congress may conclude that a particular activity *substantially* affects interstate commerce does not necessarily make it so. Congress' findings must be supported by a "rational basis" and are reviewable by the courts. *Hodel* at 310-311 (Rehnquist, J., concurring) (citations omitted) (emphasis added).

Bill of Rights and expressly added to the Constitution via the Tenth Amendment.[4]

B. CO-OPERATIVE FEDERALISM.

In deciding whether the limits of any enumerated power have been exceeded, the Court is directed to consider the Tenth Amendment and the principles of federalism embodied therein:

> The Tenth Amendment likewise restrains the power of Congress. . . . [T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article power.

New York v. United States, 112 S.Ct. 2408 (1992) (emphasis added). The Court's role in deciding the proper use of the Commerce power, therefore, necessarily includes analyzing how a particular exercise of that enumerated power relates to the Tenth Amendment and the incidents of state sovereignty that the Tenth Amendment protects. Through such an analysis,

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[4] In *Lopez*, this Court rejected the same expansive view of the Commerce Clause that the "migratory bird" rule purports to be based upon:

> We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is quite difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. *Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.*

United States v. Lopez, 115 S.Ct. 1624, 1632 (1995). (emphasis added).

the "proper" or "healthy" balance of federalism is preserved. In conducting that analysis,

> [I]t makes no difference whether one views the question at issue in this case as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the states under the Tenth Amendment.

Id. at 2419.

The foregoing confirms that "the Tenth Amendment and the Commerce Clause issues . . . are but two sides of the same coin." *Lopez*, *supra*. Regarding the Tenth Amendment side of the coin, "state sovereignty is not just an end in itself," *New York*, 112 S.Ct. at 2431, but "[r]ather federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).[5]

Regrettably, the tone of the Ninth Circuit's opinions suggests that the distinctions drawn by the Petitioner's suit are small matters and mere quibbling in light of the undeniable juggernaut of Congressional power that has been unleashed under the Commerce Clause. The Ninth Circuit simply asserted, without discussion, that "[t]he commerce clause power . . . is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds." *Leslie Salt v. United States*, 896 F.2d 354, 360 (9th Cir. 1990). In its most recent decision, although conceding that "[t]he migratory bird rule certainly tests the limits of Congress' commerce powers and, some would argue, the bounds of reason," the court declined to reconsider its previous holding, which was deemed not "clearly erroneous," and therefore binding as the law of the case. The result is in conflict with this Court's recent decision in *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624 (1995).

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[5] The analysis is larger in its implications and more significant in its substance because the Tenth Amendment and its incidents of state sovereignty must be viewed in light of the "fundamental liberties" it protects. *See New York*, 112 S.Ct. at 2431.

This Court recognized that to uphold the government's arguments for the validity of the Act, "we would have to pile inference upon inference in a manner that would bid fair to a convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states." 115 S.Ct. at 1634.

As in *Lopez*, the prohibition has nothing directly to do with interstate commerce. The discharger may be a local landowner with no interstate connection and his actions may have no commercial purpose. By hypothesis, the "waters" involved are entirely intrastate, are isolated from any interstate waterbody, and serve no interstate function. They are regulated solely on the basis of their use by migratory birds. Yet, obviously enough, the self-propelled flight of birds across state lines is not itself interstate commerce. Accordingly, local activity that bears on such bird migration – even if adversely (not a showing required under migratory bird rule or attempted here) – is not within the reach of the Commerce Clause unless some true interstate commerce can be shown to be "substantially affected" by the challenged activity. *Lopez*, at 1632. As in *Lopez*, that finding cannot be made here without "pil[ing] inference upon inference." The migratory bird rule does not depend on the "commercial" character of the avian visitors.

However, "for want of a nail" large causes have been lost and it will not do, therefore, to dismiss considerations of small things as small things or mere quibbling when they relate to the structure of the Constitution itself. Accordingly, *Amici* respectfully requests that the Court grant the Petition for *certiorari* and strike the constitutional infirmity in this case.

III. THE NINTH CIRCUIT'S DECISION IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THIS COURT'S PREVIOUS DECISIONS REGARDING THE LIMITS OF FEDERAL POWER.

When writing the majority opinion in *Garcia v. San Antonio*, 469 U.S. 528 (1985), Justice Blackmun rejected the Tenth Amendment tests employed by previous courts for discerning what constitutes the essential elements of state sovereignty.

The error with each of these tests, Justice Blackmun noted, is that they inevitably invite an unelected federal judiciary to make decisions as to which state policies it favors or dislikes. Therefore, instead of looking at governmental functions, the Court focused on "principles of democratic self governance." *Garcia* at 546. (emphasis added).

Federalism principles, implicit in the Constitution, demand an initial inquiry into democratic principles of self-governance necessarily performed by state and local governments. Land use planning or control is an essential attribute necessary to the separate and independent democratic state governments because: (1) it encompasses the process of evaluating, establishing and zoning wholly intrastate non-commercial state and private activity, as well as commercial activity, in order to effectuate the desired nature of and the quality of life in local communities (which is not the private business activity differentiated in *New York*); (2) it cannot be viewed in a single dimension as an exercise of the police power, rather, land-use planning is a hybrid governmental service by which states and local communities define and effectuate the nature and quality of their existence as well as governmental fiscal structure; (3) federalism principles involve concepts of local self determination and accountability essential to the determination of and quality of the existence for local communities and their people; (4) land-use planning and control is, in fact, the manifestation of a physical quality of a state because it is a state's use of its lands, i.e., an assertion of a state's quasi-real property interest in the land within its borders; and (5) the presumed local benefit-burden resulting from land-use planning and control or the "average reciprocity of advantage" becomes nonexistent if exercised by the Federal Government under the Commerce Clause, thereby raising serious Fifth Amendment questions.

The "migratory bird rule", as erroneously justified by the Ninth Circuit, attempts to view and define federal land-use planning and control solely in terms of visiting interstate birds. The migratory bird rule does not require a "commercial" bird that may, after capture, become an object of "commerce between the States." Nor does it depend on interstate human travellers (whether hunters, scientist, or bird watchers). If it

were otherwise, there would be no need to restrict coverage to migrating birds that cross state or international boundaries. Unlike the statute in *Lopez*, neither the text nor the legislative history of the Clean Water Act remotely suggests that the migratory bird rule was contemplated. However, land-use planning and control necessarily involves evaluating, establishing and zoning intrastate non-commercial state and private activity,[6] as well as commercial activity, in order to effectuate policies (which transcend economics) for the overall nature of, and quality of life, in local communities.

The essence ("experience") of land use planning and control transcends being characterized solely in terms of a power source. States and their local communities, through the means of land use planning and control, define and effectuate that intangible but recognizable quality of life within a given community, including whether it will provide "open space" and limit population density, *Agins v. City of Tiburon*, 447 U.S. 255 (1980); whether it will encourage industrial development, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); and whether it will seek to preserve historic and natural advantages, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). These decisions are based upon such considerations as the location and availability of fire, water, and sewer services to a given area; potential depletion of local resources; availability of other suitable lands; meeting a community's growth demands; protecting the public health by appropriately zoning incompatible uses; providing recreational opportunities for its citizens, and providing a sufficient tax

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[6] No Commerce Clause case has involved even remotely similar far-reaching impacts on intrastate private and state non-commercial activity as presented by direct federal land-use planning and control using a "national significance" standard. Many cite *Wickard v. Filburn*, 317 U.S. 111 (1942), as allowing the Commerce Clause power to reach the personal consumption of wheat. Such a view is a gross distortion. A person growing wheat in their backyard only for personal consumption, no part of which is to be sold in commerce, was not subject to the Agricultural Adjustment Act. However, federal land-use planning under the agencies' "migratory bird rule" would prohibit wholly intrastate private and state non-commercial activity, even though a state or local community would benefit from other uses, i.e., the quality of life in and the nature of local communities.

base to support local governmental services. "Accountability is thus diminished when due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate. . . . " *New York, supra.*

Land-use planning and control is also integral to the local governmental financial structure and stability necessary to the delivery of certain essential governmental services. In fact, most of the school systems throughout the United States are financed directly by and their quality is dependent upon real and personal property tax revenues, *see, e.g. San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 10 (1973). Local communities utilize land-use planning concepts interrelated with property taxes to encourage or discourage various uses of property and to enhance the financial stability of the governmental unit so as to be able to make and effectuate policy decisions in these governmental service areas.

Amici's numbers are extremely alarmed at the concept of designating areas as "waters of the U.S." solely because they are visited by migratory birds as a justification for federal land-use controls. *Amici* believe that the migratory bird rule is nothing more than a device designed to skirt the Constitution's provisions for a limited federal government and protection of individual liberties, all protections of little value if Congress is free to convert clearly defined private rights into vast public rights. Liberty is nothing if it is to be subjected to such utilitarian calculations, or to the dictatorship of unconstrained majoritarianism.

As recognized by this Court: "[z]oning laws and their provisions, long considered essential to effective urban planning are peculiarly within the province of the state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975). These elements of self-determination and accountability have been emphasized by this Court since the early land use cases,[7] and are essential because of the very diverse

[7] For more than 200 years, regulation of land use has been exercised exclusively by the states. *City of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926);

culture, geography, geology and climate among the states that "have all but necessitated the recognition of legal distinctions corresponding to these difference," including principles of federalism. *California v. United States*, 438 U.S. 645, 648 (1978).

In fact, "[p]reservation of local control, naturally enough, involves protecting the integrity of state and local governments." *City of Rome v. United States*, 446 U.S. 156, 201 n.12 (1980) (Powell, J., dissenting). *Amici* submit that to remove the hybrid governmental service of land-use planning and control from those directly affected and concerned is to allow rule by those whose existence and destiny and, therefore, perspective, is totally removed from the consequences, without accountability to those affected. It would cut to the core of federalism.

IV. LAND IS NOT A COMMODITY READILY SUSCEPTIBLE TO UNIFORM NATIONWIDE PLANNING OR REGULATIONS.

Land-use control and planning is, in fact, a state's use of its lands based on a quasi-property interest. Accordingly, the state's relationship to its lands has been afforded special treatment by this Court. *See, Kansas v. Colorado*, 206 U.S. 46, 93 (1907). For example, land within a state's boundaries is subject to public or state use in the form of a servitude by which the state can restrict the owner's right to use the property for the benefit of the state and its citizens without a "taking" necessarily occurring, in part because of the presumed local benefit-burden resulting from land use planning and control. *See, Keystone Bituminous Coal Assoc. v. De Benedictis*, 480 U.S. 470 (1987).

Equally as important in the balancing of land use planning and control within the constitutional framework and principles of Federalism is the Fifth Amendment protection afforded property rights that cannot be "taken for public use, without

Berman v. Parker, 348 U.S. 26 (1954); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

just compensation." Historically, Congress has expressly provided compensation mechanisms when it determines that private property must be taken for public use.[8] Because there is an average reciprocity of advantage, there may be situations when compensation is not required:

> Any limitation so severe [as a confiscatory regulation] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the *State's* law of property and nuisance already placed upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts – by adjacent landowners (or other uniquely affected persons) under the *State's* law of private nuisance, or by the *State* under its complimentary power to abate nuisances that affect the public generally or otherwise.

Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992) (emphasis added).

This average reciprocity of advantage emphasizes the elements of self-determination and accountability within the concepts of Federalism. Allowing the federal government, under the Commerce Clause, to dictate land use control and planning concepts based on "substantial and adverse effects" upon commerce would either effectively remove or so dilute the local benefit to landowners and leave only the burden, as to impinge directly upon Fifth Amendment rights.[9]

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[8] For example, programs to acquire private lands to remain essentially in their natural state for the public benefit, be they wetlands, coastal areas, and other open spaces for parks, wildlife refuges, and the like. *See e.g.*, Emergency Wetlands Resources Act of 11986, 16 U.S.C. §§ 3921-3923; The Recreation Use of Conservation Areas Act of 1962, as amended, 16 U.S.C. § 460 K-1; The Land and Water Conservation Fund Act of 1965, 16 U.S.C. § 4601; The National Wildlife Refuge System Administration Act, 16 U.S.C. § 688 dd(3); The Migratory Bird Conservation Act, as amended, 16 U.S.C. § 715; The Federal Land Policy and Management Act, 43 U.S.C. § 1748.

[9] *See, Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (the question "at bottom" in a takings case is "upon whom the loss of the changes

In today's society, one of the most essential attributes of sovereignty possessed by the states and their political subdivisions and one that is constitutionally protected is this hybrid governmental service of land-use planning and control through the states' use of their lands for the benefit of their citizens. That Congress has not previously sought to impose nationwide, uniform and mandatory land use requirements undoubtedly reflects a recognition of the uniqueness of each parcel of land. Land traditionally has been subject to the equity jurisdiction of the courts so as to provide flexibility and avoid the harsh results that might be obtained if considered under rigid rules of law. *IV Pomeroy's Equity Jurisprudence*, § 1402 p. 1034; 2 Story, *Equity Jurisprudence*, §§ 829-843, 993.

While the legislative scheme set up in the CWA "to restore and maintain the chemical, physical and biological integrity of the Nation's waters," CWA § 101, 33 U.S.C. § 1251, was intended to expand federal regulation beyond the reach of traditionally navigable waters, Congress did not automatically include every waterbody, however isolated, within the coverage of the Act. As this Court noted in *United States v. Riverside Bayview Homes*:

> In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into "navigable waters," [citations omitted], the Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control

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desired should fall.") *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987) (takings clause is " 'designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole.' " (quoting *Armstrong v. United States*, 364 U.S. 40, 40 (1960)); *Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n.4 (1987) (the government cannot "single [ ] out 'individuals' to bear the burden of [its] attempt to remedy" public problems).

> statutes and to exercise its powers under the Commerce Clause to regulate *at least some waters that would not be deemed "navigable" under the classical understanding of that term.* See S. Conf. Rep. No. 92-1236, p. 144 (1972); 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell).

474 U.S. at 133 (emphasis added).

Thus, this Court's *Riverside Bayview* decision does not remotely suggest that the CWA embraces non-navigable waterbodies that are not connected to any navigable water system, much less isolated wetlands, wetlands above the headwaters, or temporarily ponded rainwater. This Court pointedly did not endorse the Government's suggestion that the 1977 reconsideration of the statute should be taken as proof that § 404, as enacted in 1972, was intended to authorize the full sweep of the Corps' regulations, including the provision that reaches "isolated" waters and wetlands.

CONCLUSION

For the foregoing reasons, a *writ* of *certiorari* should be issued to review the decision of the Ninth Circuit Court of Appeals. The insidious assault that decision permits against our constitutionally protected federal form of government must be turned back.

Respectfully submitted,

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